No. 04-1152

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF BOY SCOUTS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION	4
A. Defining an Expressive Association ...	5
B. The Interference Test	7
C. Compelling State Interests	10
II. THE PUBLIC FORUM ANALOGY	13
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

Page

Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *appeal docketed* Nos. 04-55732 & 04-56167 (9th Cir. Apr. 29, 2004) 2-3

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 4-5, 11-12

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) .....*passim*

Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004) 2

Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788 (1985) 13

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 17

Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 17

Elrod v. Burns, 427 U.S. 347 (1976) 10

Evans v. City of Berkeley, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), *review granted*, 65 P.3d 402 (Cal. 2003) 3

Cited Authorities

Page

Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) 1

Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987) (en banc) 16

Healy v. James, 408 U.S. 169 (1972) 10

Hishon v. King & Spalding, 467 U.S. 69 (1984) ... 12

Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996) 17

Hudson v. Craven, 403 F.3d 691 (9th Cir. 2005) ... 6

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 7-9, 15

Jeffries v. Harleston, 52 F.3d 9 (2d Cir.), *cert. denied*, 516 U.S. 862 (1995) 6

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 14

Maguire v. Marquette University, 814 F.2d 1213 (7th Cir. 1987) 6

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 10

Page

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 12

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 12

Olmstead v. United States, 277 U.S. 438 (1928) ... 11

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 15-16

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 4-5, 10, 11-12

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) 4, 13-15, 17

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 15

United States v. Lee, 455 U.S. 252 (1982) 10

Widmar v. Vincent, 454 U.S. 263 (1981) 14

Page

STATUTES

Solomon Amendment, 10 U.S.C. § 983 (2005) 4

PUBLICATIONS

Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996) 17

Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the United States Court of Appeals for the Third Circuit entered in this case. 390 F.3d 219 (3d Cir. 2004).[1]

INTEREST OF THE *AMICUS CURIAE*

Boy Scouts of America ("Boy Scouts") is a nonprofit membership organization with the mission of instilling in young people the values of the Scout Oath and Law. In furtherance of that mission, all potential youth members and adult volunteer leaders must agree to live by the Scout Oath and Law.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court protected the selection of volunteer leadership as Boy Scouts' exercise of the right of expressive association. The state may not use nondiscrimination statutes to regulate Boy Scouts' leadership choices aimed at preserving Boy Scouts' mission. *Id.* at 655 (leadership policy is Boy Scouts' "method of expression").

Boy Scouts joins as *amicus* here for two reasons.

First, it is crucial to Boy Scouts that both the letter and the intent of *Dale* be upheld, and the decision below fails to

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1. Petitioners and Respondents granted consent to file this brief. Counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

apply *Dale* correctly. This *amicus* believes that a correct application of *Dale*, without any need to weaken the tests described therein, supports the government's case here.

Second, the government's position here is best considered by analogy to public forum doctrine. It is both reasonable and constitutionally permissible to require law schools either to accept military recruiters as participants in employer forums–essentially open to all employers or to forego federal funds. The rationale is clear from this Court's public forum precedents: law schools are not the speakers in employer forums, the employers are. This is the fundamental mistake made by the court of appeals.

The notion that the facilitator of an open or public forum thereby endorses the speech of participants in the forum is the same fundamental mistake made by courts recently with respect to Boy Scouts. These courts have excluded Boy Scouts from public forums on the theory that government agencies which set up public forums would be voicing support for the theistic or moral values of the Scout Oath and Law if Boy Scouts participated. *See Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (court ordered exclusion of Boy Scouts from the Connecticut employee charitable campaign forum open to all manner of ethnic-, gender-, age- and religious-based charities, on the basis of an argument that State statutes forbid Connecticut from supporting discrimination), *cert. denied*, 541 U.S. 903 (2004); *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (court ordered Boy Scouts excluded from the City of San Diego's leasing program open to all nonprofit lessees suitable for City properties, and currently including over 100 leases to nonprofit groups and churches, on the theory that the City's leases to Boy Scouts

constituted an endorsement of religion), *appeal docketed* Nos. 04-55732 & 04-56167 (9th Cir. Apr. 29, 2004); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002) (court ordered Sea Scouts excluded from a Berkeley program providing free berthing to nonprofits at the City marina, and currently including several nonprofit groups serving protected populations, on the rationale that the marina's nondiscrimination ordinance applied to Boy Scouts' internal leadership policies), *review granted*, 65 P.3d 402 (Cal. 2003). However, a public forum is an opportunity provided by the facilitator of the forum for *others* to speak, and not a platform for its own speech.

The argument that the facilitator of a forum is responsible for the speech of individual participants fails to take into account this Court's public forum precedents. Here, law schools argue that they somehow speak through employment forums set up only as conduits for employers. Preventing future courts from relying on this specious argument will not only result in what is indeed "fair" for military recruiters, but will help to clarify an area of public forum doctrine which is increasingly ignored in order to penalize Boy Scouts for its speech.

SUMMARY OF ARGUMENT

The *Dale* tests for what constitutes an expressive association and what constitutes interference with expressive rights are deferential to the organization asserting those rights. First, a law school plausibly is an expressive association. The determinative fact here, however, is that the association, quite obviously, is composed of the law school's administration, its faculty and its students. Potential employers of students do not join a law school or become identified with a law school simply because they recruit at

the school. Second, employers do not seek to interfere nor do they actually interfere in law school speech. There is nothing in *Dale* that applies to invalidate the Solomon Amendment, 10 U.S.C. § 983 (2005).

The Solomon Amendment requires as a condition of receiving federal funds that military recruiters receive access equal to the employer forums that law schools already voluntarily provide other employers. This is precisely analogous to public forum cases. In such a forum, the facilitator of the forum "does not itself speak or subsidize transmittal of a message it favors." *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 834 (1995). Thus, there is no issue of military recruiters who participate in employer forums interfering with law school speech or compelling law school speech.

ARGUMENT

I. THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION

Following on *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the Court in *Dale* set forth a framework for constitutional protection of expressive association. The membership decisions of an association cannot constitutionally be regulated if:

(1) the association is expressive, and

(2) the forced inclusion of an unwanted person in the association affects in a significant way the association's ability to express itself;

unless

(3) the regulation of the membership decision serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms.

Dale, 530 U.S. at 648-50; *Rotary*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 622-23.

A. Defining an Expressive Association

The right of expressive association is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622.

Law schools warrant consideration as expressive associations. The constituents of law schools clearly come together for "educational" purposes, if not also "political" and "social" ones. Certainly some students will be attracted to some law schools because of particular emphases in curricula or policies. Law schools seek to convey legal values to students, and that should serve to qualify them as expressive associations: "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Dale*, 530 U.S. at 650.

What is also clear, however, is that employers seeking to interview students do not seek "inclusion" as members or constituents of law schools in any sense. In *Dale*, James Dale sought appointment as assistant scoutmaster for the Boy Scouts, a representative, leadership, and uniformed role within the organization. "During the time spent with the youth members, the scoutmasters and assistant scoutmasters

inculcate them with the Boy Scouts' values—both expressly and by example." *Id.* at 649-50. The issue was not James Dale's temporary physical presence in a Boy Scout building, but his proposed capacity "as an assistant scoutmaster" for Scouts. *Id.* at 654.

James Dale sought a role equivalent to that of a law school faculty member or an administrator of a private institution. Clearly, all schools are free not to hire or to terminate a faculty member or administrator who speaks or behaves inappropriately for a representative of the institution, although thresholds vary between public and private institutions. *See Hudson v. Craven*, 403 F.3d 691, 701 (9th Cir. 2005) (public community college justified in terminating economics instructor for attending World Trade Organization protests with students); *Jeffries v. Harleston*, 52 F.3d 9, 14-15 (2d Cir.) (public university justified in removing department chair as a result of off-campus speech that included derogatory statements about Jews), *cert. denied*, 516 U.S. 862 (1995); *Maguire v. Marquette University*, 814 F.2d 1213, 1217-18 (7th Cir. 1987) (Catholic university stated a valid reason for failing to hire professor with antithetical views on abortion).

The matter would be quite different if, for example, the law were to require that schools bestow honorary degrees on military recruiters or to require that schools include military recruiters as speakers in courses or panel discussions. Law schools cannot be required to place recruiters in representative or pedagogic positions. But that is not the case here.

Dale is not implicated because military recruiters and other employers do not seek to become anything akin to

members, leaders, or representatives of law schools. Employers represent only themselves when they appear at the appointed date and time to see interested students. Employers are outsiders, not insiders. Thus, associational interests are unaffected.

B. The Interference Test

In *Dale*, as in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), before it, the Court adopted a deferential view of what constitutes interference with associational rights. In *Dale*, the Court held that the inclusion of James Dale "as an assistant scoutmaster would . . . surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," even if the Boy Scouts' purpose was not to disseminate a belief with respect to homosexuality. 530 U.S. at 654. "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655.

Similarly, in *Hurley* the Court held that the parade organizers for the St. Patrick's Day Parade had the right to exclude the Gay, Lesbian and Bisexual Group as a parade contingent marching behind a banner. 515 U.S. at 566. Despite the fact that "the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation," the Court held that "the parade organizers had a right to exclude certain participants nonetheless." *Dale*, 530 U.S. at 655.

However, this deferential standard was applied in situations where there was an expectation of a necessarily expressive role for the party seeking inclusion in the organization.

In both *Dale* and *Hurley*, the persons seeking inclusion sought to contribute their own views to the message of the organization. Dale sought to be "open" about who he was, and his admission into the organization as "an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform," *id.* at 655-56, would "*force the organization to send a message, both to the youth members and the world*, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," *id.* at 653 (emphasis added). Similarly,

> *a contingent marching behind the organization's banner would at least bear witness* to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would *suggest their view* that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals. . . .

Hurley, 515 U.S. at 574 (emphasis added).

Here, the evident goal of the party seeking inclusion needs to be considered. The military recruiters do not seek to send any message on the backs of law schools. They derive no moral authority from law schools when they participate with other employers in employer forums at law schools. They do not, in fact, seek any substantive relationship with law schools at all.

In addition, the organization's interest in the position being sought needs to be considered. In *Dale* and *Hurley*, there was irrefutable evidence that the Boy Scouts and the St. Patrick's Day parade organizers, in advance of the lawsuits, intended expressive roles for the positions sought. An assistant scoutmaster wears a leader's uniform and teaches Scouts, even if "only by example." *Dale*, 530 U.S. at 655. And the role of a parade contingent within the overall parade is clear: "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Hurley*, 515 U.S. at 568. Each contingent contributes one aspect of the parade's expression.

However, here it cannot seriously be asserted that law schools intend employers to contribute to the law schools' expression in availing themselves of employer forums in law schools. Law schools do not seek to be identified with the potential employers, as a whole or individually. Law schools do not provide employers with a law school uniform or banner; military recruiters further distinguish themselves by wearing their own military uniforms.

Students are expected to differentiate between employers and make their own judgments. The opportunity to be judged as a potential employer *by adult students* is the only opportunity provided by law schools to employers, and it is all the military seeks here.

Finally, the result of the proposed "inclusion" here is distinctly different from that of *Dale* or *Hurley*. James Dale and GLIB could not be admitted to the Boy Scouts and to the St. Patrick's Day Parade halfway, and the speech of the former would become subsumed in the speech of the latter.

Here, however, because law schools and the military remain separate organizations with their own goals and expression, law schools may issue any statement they wish critical of the military or its policies. Law schools are free to continue or expand the speech they already propound on the topic of military policies.

C. Compelling State Interests

This Court has insisted that any attempt by the state to override First Amendment rights requires the state to establish that the public purpose sought to be achieved is not only facially legitimate, but "compelling" and unrelated to the suppression of speech. *See, e.g., United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958). In *Roberts*, the Court stated:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve *compelling state interests, unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms.

468 U.S. at 623 (emphasis added); *see Dale*, 530 U.S. at 648.

Given the weight of the constitutional priority of the Congressional power to raise an army against the questionable First Amendment interest involved here, there is no more suitable case in which to find a compelling state

interest. However, reliance on the compelling state interest exception in associational cases is fraught with peril. Local governments are often insensitive to constitutional limitations on their powers as it is, and bald reliance on a compelling state interest argument by this Court might serve to bolster local governments in squelching expressive rights. For the small-minded, there is always a compelling reason for a statute to trump Free Speech or for the Establishment Clause to trump Free Speech if the goal is "beneficent." *See Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.").

In *Dale*, the Court held that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659. The Court distinguished *Roberts* and *Rotary* on the fact that the enforcement of the statutes in those cases did not "materially interfere with the ideas that the organization sought to express." *Id.* at 657. Thus, under *Dale*, a statute invalidated on the basis of the interference test would seem to fail the state interests test automatically because application of the statute had been deemed "'[]related to the suppression of ideas.'" *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

Conversely, as in this case, a statute with a legitimate purpose that survives the interference test also seems likely to survive the state interests test. Certainly here, the military's interest in the Solomon Amendment is compelling. In addition, as discussed above, enforcement of the Solomon Amendment "would not materially interfere" with law school speech and thus should pass muster as "unrelated to the

suppression of ideas." However, because interference with or suppression of speech often lies in the eye of the beholder, this *amicus* believes that it would greatly improve the precedential value of this case to make explicit an additional aspect of a "compelling" state interest that was implicit in distinguishing *Dale* from *Roberts* and *Rotary*.

Consideration of what constitutes a compelling state interest should include consideration of the nature of the activity being regulated. State regulation that leads to the expansion of economic activities such as employment opportunities deserves greater deference. *Roberts*, *Rotary*, *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), and similar cases are most instructive when viewed in this light. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460-62 (1978). While the state's interest in regulating organizations grows with the increase in the organization's ability to control access to commerce or employment, the state's interest becomes far weaker when charitable activities or social recognition are the issues, as was the case in *Dale*.

The outcome of inclusion of military recruiters here is that students have access to a greater number of potential employers. The Solomon Amendment is aimed at hurdles erected by law schools between interested students and a major employer and serves to open opportunities for career advancement. Thus, apart from the military's interests, an interest in the expansion of employment opportunities for students favors the government's case here as well.

II. THE PUBLIC FORUM ANALOGY

The law schools in this case should be viewed as having created an open forum for employers to interview interested students analogous to the public forums identified in First Amendment cases. Facilitators of forums do not intend to speak through the individual participants in forums and, therefore, do not have a right to veto the speech of individual participants on the basis of distinctions which are "not 'reasonable in light of the purpose served by the forum.'" *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985)).

In *Rosenberger*, the University of Virginia had set up a Student Activities Fund ("SAF"), paid for by students, to support a broad range of extracurricular student activities that were "related to the educational purpose of the University" and that "tend[ed] to enhance the University environment." *Id.* at 824. Eleven categories of student groups qualified for SAF funds, including "student news, information, [and] opinion." *Id.* However, religious and political activities were specifically excluded. In the 1990-1991 academic year, 135 student groups applied for SAF funds, and 118 received those funds. Of the 118, 15 were funded as student news organizations. *Id.* at 825. When the student publisher of a Christian magazine, Wide Awake Productions, attempted to use the SAF to pay its printing costs as a student news organization, it was excluded as a "religious activity." *Id.* at 827.

This Court invalidated the exclusion of Wide Awake Productions from the forum, noting that once the University opened a forum dealing with certain subject matter, it "must

respect the lawful boundaries it has itself set" with respect to that subject matter. *Id.* at 829. The University may regulate content if it preserves the purposes of the forum, but it may not engage in viewpoint discrimination against perspectives on subject matter otherwise "within the forum's limitations." *Id.* at 830. The Court quoted *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), which held that a school district violated the First Amendment when it permitted school property "'to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint.'" *Id.* at 830 (quoting 508 U.S. at 393). The Court also relied on *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court struck down a public university's exclusion of religious groups from use of school facilities made available to all other student groups.

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted [it] to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . .
>
> It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. *A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech. . .*

> . . . Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

Rosenberger, 515 U.S. at 833-35 (emphasis added).

This Court has come to similar conclusions in the private context as well, when owners by design or by practice have created forums. The clearest cases concern cable companies and the public access channels they were required to carry in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), which this Court contrasted in *Hurley*, 515 U.S. at 575-77, as well as the shopping center in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Turner Broadcasting*, the "must carry" policy, which conditioned a license on granting access to speakers who might or might not agree with the cable company, did not impose an unconstitutional condition on the cable company's speech. The Court found that "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." 512 U.S. at 655.

In *PruneYard*, the requirement that the shopping center permit student protestors to exercise rights of free expression and petition on shopping center property did not amount to an unconstitutional infringement of its owner's free speech rights. The shopping center—by choice of its owner—was not limited to the personal use of its owner but was instead open for others to use. 447 U.S. at 87. As a result, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not

likely be identified with those of the owner." *Id.* Moreover, the shopping center and its owner were not "being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers." *Id.* at 88.

Similarly here, law schools have created an open forum for employers to interview and recruit interested students. There is no substantive expressive message that law schools seek to make through maintenance of these forums. *See Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. 1987) (en banc) (awarding gay student group access to physical privileges of forum available to other student groups in Catholic university under antidiscrimination statute, but not awarding official university recognition).

Furthermore, "nondiscrimination" as a qualification for participation in the forum can only serve to preclude *unlawful* discrimination if the qualification is to have any genuine and nonarbitrary meaning.[2]

In the First Amendment context, the only constitutional interpretation of a "nondiscrimination" requirement is the preclusion of unlawful discrimination. If the University of

2. When applied to *lawful* employment criteria or constitutionally protected membership criteria, the term "discrimination" is merely name-calling. This use of the term is a moral judgment that has no legal import. It was used by the court of appeals here in describing military policy in order to lend credibility to an unsound decision. Similarly, in rulings against Boy Scouts, courts have used the term to denigrate Boy Scouts' constitutionally protected views in order to justify violating its rights.

Virginia's excuse for excluding Wide Awake Productions had been the forum's "nondiscrimination" exhortation, rather than the Establishment Clause, the result of *Rosenberger* would be the same. Wide Awake Productions published Wide Awake magazine as a form of "philosophical and religious expression" to foster a "tolerance of Christian viewpoints" and to unify Christians of multicultural backgrounds. 515 U.S. at 825-26. Atheists and Wiccans would not qualify as the editors. Certainly, Wide Awake Productions had an associational right to the selection of Christian leadership, just as a La Raza student group would have a right to the selection of Hispanic leadership. No "nondiscrimination" requirement can interfere with that right. *Dale* at least stands for this proposition, if not *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), before it. *See Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996).

Here, the military's employment policies are entirely lawful, and the military's participation in an open forum which is facilitated but not substantively regulated by law schools does not affect law school speech. Facilitators of forums do not speak through individual participants, and thus cannot be said to be responsible for the speech of individual participants.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be reversed.

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